88-1590

Supreme Court, U.S.
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MAR 27 1989
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No.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1988

RICKY T. RUSSELL, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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RICKY T. RUSSELL, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Ricky T. Russell, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on January 27, 1988.

QUESTION PRESENTED

Whether mere conclusions that statements made by a confidential informant are detrimental to that informant's own interest, contained in an affidavit of probable cause, demonstrate the informant's reliability sufficiently to establish probable case under the Gates totality of circumstances standard?

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The Supreme Court of Pennsylvania entered an Order denying the Petition For Allowance of Appeal in this case but did not issue an opinion. A copy of the notification of said Order that was provided to Petitioner's counsel is contained in the Appendix, infra.

The Superior Court of Pennsylvania issued a judgment which was filed but not published. See, ____ Pa. Super ____, ___ A2d __ (April 5, 1988). A copy of said judgment is set forth in the Appendix, infra.

The Court of Common Pleas of Lancaster County, Pennsylvania also issued a written opinion in this

case. That opinion is unreported. A copy of it is also contained in the Appendix, infra. ⌙

JURISDICTION

The order of the Supreme Court of Pennsylvania was entered January 27, 1989. The jurisdiction of this Court is invoked pursuant to 28 USC Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the clause of the Fourth Amendment to the Constitution of the United States, which provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On October 4, 1986, members of the Lancaster, Pennsylvania Bureau of Police searched a home located at 834 Union Street, Lancaster. The search was conducted shortly after the police applied for and obtained a search warrant for the premises. A copy of the probable cause portion of the affidavit for the search warrant is contained in the Appendix, infra.

In the search various items including four syringes, a tablespoon with residue, a rolled up one dollar bill, a razor blade with residue and small clear plastic bag containing a white powdery substance were seized.

As a result of the search, Petitioner Ricky T. Russell, who lived at the Union Street address with his mother, was charged with possession of .19 grams of cocaine, a misdemeanor violation of the Controlled Substance, Drug, Device and Cosmetic Act.

On Janaury 11, 1987, Information No. 2730 of 1986 was filed against Petitioner. A copy of the Information is contained in the Appendix, infra.

Prior to trial, Petitioner filed a Motion to Suppress the evidence. The Motion challenged the reliability of the confidential informant and the sufficiency of the probable cause. After a

stipulation of facts by counsel and hearing, the trial court denied the motion. Petitioner proceeded to trial on March 2, 1987 and was found guilty of possession of cocaine. Post trial motions challenging, among other things, the denial of the Motion to Suppress were filed and denied. A copy of the trial court's Opinion denying the Motions is contained in the Appendix, infra.

On September 24, 1987, Petitioner was sentenced to a maximum term of imprisonment of 6 to 12 months. Petitioner filed a Motion to Modify Sentence on October 1, 1987. This Motion was denied.

Petitioner filed an appeal to the Pennsylvania Superior Court. Petitioner again raised the lack of probable cause for the issuance of the search warrant. By Judgment and Order dated April 5, 1988, the Superior Court denied the appeal. A copy of the Judgment and Order are contained in the Appendix, infra.

On May 5, 1988, Petitioner filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. The Petition was denied on January 27, 1989. A copy of the Notice of Entry of Order denying the Petition is contained in the Appendix, infra.

REASON FOR GRANTING THE WRIT

The affidavit of probable cause used by the Lancaster City Police to obtain the search warrant for Petitioner's house does not contain sufficient underlying facts or information from which a neutral and detached magistrate should have concluded that there was a reasonable probability that Defendant was engaged in criminal activity or that contraband would be found. The affidavit is devoid of any indication, other than bald conclusions, that the confidential informant was credible or reliable. The statements contained in the Affidavit which attemtped to

establish the confidential informant's reliability were:

1. That on 4 October 1986, Det. Ross Deck of the Lancaster Bureau of Police received information from a reliable informant who wishes to remain anonymous. Said informant, who is providing information detrimental to his/her own interest

. . .

3. The informant stated he/she is familiar with the use and abuse of cocaine and methamphetamine and all attending circumstances surrounding the use and abuse of same.

Affidavit of Probable Cause. Appendix F.

These statements are, without more, insufficient to establish probable cause under the "totality of the circumstances" test of Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed. 2d 527 (1983). This test which was adopted by the Pennsylvania Supreme

Court in Commonwealth v. Gray, 509 Pa. 476, 503 A. 2d 921 (1985), requires that:

> Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action can not be a mere ratification of the bare conclusion of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.

Id. at 239

Although Gates has relaxed the strict two-prong Aguilar-Spinelli test this Court "in no way abandon[ed] Spinelli's concern for the trustworthiness of informers and for the principle that it is

the magistrate who must ultimately make a finding of probable cause." Id. at 238.

The affidavit in this case does not even approach the information provided in the affidavit in question in Gates. Here, there was absolutely no corroboration of the bare statements that the drugs the informant allegedly saw Defendant possess at his house or that the informant was reliable. Likewise, the assertian that the statements were against the informant's "interest" not even penal interests, is without more, meaningless.

Certainly, if the statements contained in the affidavit meet the

Gates test. any officer seeking a warrant can state that a person told him that he or she saw drugs in a suspect's home and that this person made a statement against his or her own interest (whatever that interest may be).

The trial court, in finding the affidavit adequate, relied upon

> the informant's basis of knowledge (personal observation that Defendant possessed and sold drugs), the close temporal relationship between the informant's alleged observation and the date of the application for the search warrant (24 hours) and the fact that the applying officer had arrested the suspect for a similar offense of five months earlier.

Appendix B, infra.
This analysis completely ignored any factor which would bolster

reliability of the informant, and relied upon an arrest for charges which had been dismissed. Certainly the uncorroborated information provided by the informant in this case should, under the common sense and practical approach of Gates, be looked at with disfavor unless some indication other than the applying officer's conclusion that the person providing the information has some reason to be believed is present in the affidavit. The common sense and pratical approach espoused in Gates requires more. The statments contained in the affidavit in question gave the megistrate virtually no basis for

making a fair judgment of probable cause.

Although after the fact scrunity of this affidavit can not take the form of a de novo review. it is clear that the standards set forth in Gates have not been met. As a result. there was not sufficient information within the affidavit to conclude that probable cause existed. and the warrant should never have been issued. The Pennsylvania courts' decision have exceeded the standards of Gates and should be reversed.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted. The affidavit of probable cause contains mere conclusions about the informants reliability. It is insufficient to meet the standards set forth in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed. 2d 527 (1983) and its predecessors, Aguilor v. Texas, 378 U.S. 108, 12 L.Ed. 723, 84 S. Ct. 1509 (1964) and Spinelli v. United States, 393 U.S. 410, 21 L.Ed. 2d 637 (1969).

Respectfully submitted,

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APPENDIX "A"

JUDGMENT OF THE SUPERIOR COURT

OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. 2779 Philadelphia 1987
v.	:	
RICKY T. RUSSELL	:	Submitted: 2/9/88

JUDGEMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the petition for allowance of appeal from the JUDGMENT OF SENTENCE of the Court of Common Pleas of LANCASTER County be, and is DENIED.

BY THE COURT:

/s/David A. Szewczak
PROTHONOTARY

Dated: April 5, 1988.

APPENDIX "B"

OPINION OF THE COURT OF
COMMON PLEAS OF LANCASTER
COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. 2730 of 1986
v.	:	
RICKY T. RUSSELL	:	

Dated: August 14, 1987

OPINION

BY ECKMAN, P.J.

Presently before the Court are the Post-trial Motions in Arrest of Judgment and For a New Trial filed by Defendant, Ricky T. Russell.

On October 4, 1986, Defendant was charged with violating the Controlled Substance, Drug, Device and

Cosmetic Act (hereafter "Act")[1] for possession of cocaine. He filed an Omnibus Pretrial Motion in the nature of a Motion to Suppress Evidence. Based upon the Stipulation of facts and issues presented to the Court immediately prior to trial, the Court denied the suppression motion. (N.T., pp. 4,5). At the same time the Court also denied Defendant's oral motion in limine requesting that certain evidence pertaining to drug

---

1. Act of April 14, 1972, P.L. 233, No. 64, Section 13, as amended; 35 P.S. 780-113(a)(16).

paraphernalia be held inadmissible. (N.T., pp. 7,8). Defendant proceeded to trial on March 2, 1987, and was convicted. Defendant timely filed the instant written motions on March 13, 1987. The parties have waived oral argument before the Court en banc. Briefs having been submitted, the post-trial motions are before the Court for disposition.

Defendant has raised and briefed two[2] reasons in support of his motion.

On October 4, 1987, Detective Ross Deck of the Lancaster City Police Department applied for the issuance of a search warrant authorizing a search for

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2. Defendant in his motion in arrest of judgment set forth a challenge to the sufficiency of the evidence. Five additional issues were raiserd in his motion for a new trial. Defendant has not briefed his challenge to the sufficiency of the evidence and the boilerplate issues set forth at Paragraphs 1, 2 and 3 of his motion for a new trial. They are deemed to be waived pursuant to Local Rule of Criminal Procedure No. 31D.

controlled substances at Defendant's residence. Detective Deck's affidavit in support thereof relies on information given by a confidential informant to the effect that he/she had seen Ricky Thomas Russell, of 834 Union Street, Lancaster, in the possession of and selling methamphetamine and cocaine. The informant stated that he/she personally observed Defendant in the possession of those two controlled substances at his residence within the past twenty-four hours and that the informant "is familiar with the use and

abuse of cocaine and methamphetamine and all attending circumstances surrounding the use and abuse of same." The affidavit further states that on May 21, 1986, Detective Deck arrested and charged Ricky Thomas Russell of 834 Union Street, Lancaster, with the possession of 18.92 grams of cocaine with the intent to deliver. Detective Deck also indicates in his affidavit that the informant is providing information "detrimental to his/her own interest," but fails to state his basis for that conclusion.

In Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed. 2d 527 (1983), the Supreme Court of the United States adopted a "totality of the circumstances" standard under the United States Constitution in analyzing probable cause questions in the context of search warant applications based on information received from confidential informants. The new standard displaced the "two-pronged" analysis established in Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States,

393 U.S. 410. 89 S. Ct. 584. 21 L.Ed. 2d 637 (1969). Those cases required a search warrant to pass two specific tests, under which the issuing authority had to be able to ascertain on the face of the affidavit of probable cause, both the informant's basis for his knowledge and independent facts showing the reliability of the informant.

The Pennsylvania Supreme Court in Commonwealth v. Gray, 509 Pa. 476. 503 A.2d 921 (1985), held that the "totality of the circumstances" test adopted in Gates as a Federal

constitutional standard also meet the requirements of Article I. Section 8 of the Pennsylvania Constitution.

The new test for analyzing warrants is set forth in Gates as follows:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that a magistrate had a "substantial basis for . . . conclud[ing] that probable cause existed." Jones v. United States, [362 U.S. 257, 271, 80 S. Ct. 735, 736, 4 L.Ed. 2d 697 (1960)]

Id. at 238-39. 103 S. Ct. at 2332.

The information offered to demonstrate probable cause must, furthermore, be viewed in a "common sense, nontechnical, ungrudging and positive manner." Commonwealth v. Jones, 506 Pa. 262, 484 A. 2d 1383 (1984); Commonwealth v. Edwards, 493 Pa. 281, 426 A.2d 550 (1981); Commonwealth v. Simmons, 450 Pa. 624, 301 A. 2d 819 (1973). The probable cause is based on a finding of the probability, and not a prima facie showing, of criminal activity. Commonwealth v. Tolbert, 492

Pa. 576. 424 A. 2d 1342 (1981).

Instantly, Defendant makes much note of the fact that the affidavit, insofar as the informant's reliability is concerned, states only the Defendant's bare conclusion that the informant is providing the information against his/her interest. While we may have been compelled to similarly scruntinize the affidavit under the Spinelli veracity test, we understand the Gates standard as one which eschews a mechanical step-by-step analysis of the component

parts of the affidavit, opting instead for a unified analysis of all the circumstances set forth in the affidavit, including the reliability and basis of knowledge of the informant.

From that viewpoint, which the Supreme Court has labled "practical" and "common-sense," we conclude that the affidavit showed a fair probability that contraband would be found in the Defendant's residence. In so concluding, we place particular reliance on the informant's basis of knowledge (personal observation that

Defendant possessed and sold drugs), the close temporal relationship between the informant's alleged observation and the date of the application for the search warrant (twenty-four hours), and the fact that the applying officer had arrested the suspect for a similar offense some five months earlier.

We find, therefore, that Defendant's Motion to Suppress Evidence was properly denied.

Defendant's second, and final, argument relates to the admission into evidence, over his objection, of certain items in the nature of drug

paraphernalia seized at the time of execution of the search warrant.

In addition to cocaine, the police seized four syringes, a tablespoon with reesidue, a razor blade with residue, and a dollar bill rolled into a tube. (N.T., pp. 24, 25). These items could be considered drug paraphernalia, possession of which is an independent offense under the Controlled Substance, Drug, Device and Cosmetice Act. See 35 P.S. 780-113(a)(32). Defendant was not charged with that offense.

Defendant objected to the admission of the above items on the basis of relevancy in that he was charged only with the crime of possession of a controlled substance and not of possession of paraphernalia. Defendant argue alternatively that, even if the evidence is relevant, its probative value is outweighed by its prejudicial effect of making it appear that Defedant was a larger user of illegal drugs than the amount of cocaine seized (less than one-fifth of a gram) would otherwise indicate.

Relevant evidence is that evidence which has probative value and worth that significantly advances the inquiry and tends to establish some material fact or tends to make the fact at issue more or less probabale. Commonwealth v. Davenport, 462 Pa. 543, 342 A. 2d 67 (1975); Commonwealth v. Hoss, 445 Pa. 98, 283 A.2d 58 (1971). Evidence, to be relevant, must in some fashion advance the inquiry, tend to establish some fact material to the case, and make the existence of that fact more or less probable as distinguished from possible. Commonwealth v.

Allen. 269 Pa. Superior Ct. 146, 409 A. 2d 106 (1979).

The package of cocaine and most of the items of paraphernalia in dispute were located on a small nightstand next to the bed in the basement apartment of the home. (N.T., pp. 22-26). Defendant denied that he possessed the cocaine or that he was aware that cocaine was present in the room. (N.T., pp. 56, 90). The Commonwealth argues that, since the package of cocaine was a small one, the existence of the other more visible items of possible drug paraphernalia on the

nightstand is material to the issue of Defendant's knowledge of the existence of the drugs, and, therefore, his possession of them.

Defendant's knowledge of the existence of the contraband is certainly material and, in our opinion, the existence of the more visible items of paraphernalia on the nightstand tends to make that fact more probable. See Commonwealth v. Allen, id.

Insofar as Defendant's assertion of prejudical effect, we do not believe that the likelihood of prejudice in the form suggested by

Defendant was so great as to have compelled the Court to forego the admission of relevant evidence. In so concluding, we find the instant facts to be distinguishable from those in United States v. Wexler, 630 F. Supp. 249 (E.D. Pa. 1986),[3] which Defendant has cited.

Accordingly, we enter the following

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3. In Wexler, the defendant was arrested when he met a truck which was carrying a large amount of hashish. The Court ruled that evidence of a small amount of marijuana and hashish found in the defendant's car, which he drove to the scene, should be excluded in a prosecution regarding the hashish in the

APPENDIX "C"

O R D E R

AND NOW, August 14, 1987, for the foregoing reasons, the Motions in Arrest of Judgment and For a New Trial filed by Defendant, Ricky T. Russell, are dismissed. The Probation Department, Adult Division, is directed to immediately prepare a presentence report on Defendant, after which Defendant is directed to appear for sentencing at the call of the District Attorney.

BY THE COURT:
/s/ D. Richard Eckman
D. RICHARD ECKMAN
PRESIDENT JUDGE

Attest: /s/ Diana L. Thompson,
Cl. Dep.

APPENDIX "D"
ORDER OF THE PENNSYLVANIA SUPREME

COURT

COMMONWEALTH OF PENNSYLVANIA	:	NO. 467 E.D. Allocatur Docket 1988
v.	:	
RICKY T. RUSSELL	:	

"January 27, 1989. Petition Denied Per Curiam."

APPENDIX "E"

CRIMINAL INFORMATION FILED

AGAINST PETITIONER ON 01/23/87

IN THE COURT OF COMMON PLEAS

OF LANCASTER COUNTY,

PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. 2730 of 1986
v.	:	
RICKY T. RUSSELL	:	

The District Attorney of Lancaster County, by this information charges that on (or about) October 4, 1986, in said Lancaster County, Ricky T. Russell (who at all times hereafter shall be referred to and called by the name of actor)

Possession (Sec. 13(16))

did knowingly or intentionally unlawfully possess a controlled substance, to wit: Cocaine (Less than one (1) gram) (said controlled substance being included in Schedule II of the Controlled Substance, Drug, Device and Cosmetic Act of 1972), and said defendant not being authorized by law to possess said controlled substance. All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

/s/Joseph Madenspacher
Asst. District Attorney
Dated 1/11/87

rs

Information No. 2730 of 1986
Commonwealth of Pennsylvania
v.
RICKY T. RUSSELL

CITATION OF STATUTE/S AND SECTIONS

VIOLATION OF CONTROLLED SUBSTANCE ACT
Sec. 13 (16) Misdemeanor

APPENDIX "F"

PROBABLE CAUSE PORTION OF AFFIDAVIT FOR SEARCH WARRANT D 26857

PROBABLE CAUSE BELIEF IS BASED ON THE FOLLOWING FACTS AND CIRCUMSTANCES:

1. That on 4 October 1986. Det. Ross Deck of the Lancaster Bureau of Police received information from a reliable informant who wishes to remain anonymous. Said informant. who is providing information detrimental to his/her own interest. stated a subject by the name of Ricky Thomas Russell is in the business of selling cocaine and methamphetamine from his residence at 834 Union Street. Lancaster. Pa.. Said informant knows this information to be true and correct because he/she has personally observed Russell in possession of cocaine and methamphetamine and selling same.

2. That said informant stated that Ricky T. Russell is in possession of cocaine and methamphetamine at his place of residence in that he/she personally observed the drugs there within the past 24 hours.

3. The informant stated he/she is familiar with the use and abuse of cocaine and methamphetamine and all attending circumstances surrounding the use and abuse of same.

4. That on 31 May 1986, Det. Ross Deck of the Lancaster Bureau of Police arrested and charged Ricky Thomnas Russell with Possession of 18.92 grams of Cocaine with Intent to Deliver. At the time of his arrest Russell gave his residence as being 834 Union Street, Lancaster, Pa..